15-9 S.S. 5-55

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 178.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

PETER WIEDERER AND LEONHARD WIEDERER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 21, 1891.
(14655.)

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Peter Wiederer and Leonhard Wiederer, plaintiffs, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said Daniel Magone, plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 21st day of May, eighteen hundred and ninety-one, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23rd day of April, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 51, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Daniel Magone, plaintiff in error, against Peter Wiederer and Leonhard Wiederer, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 25th day of May, in the year of our Lord one thousand eight hundred and ninety-one, and of the independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) E. & A. A., 987. 13040. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Peter Wiederer et al., defendants in error. Writ of error. Edward Mitchell, U. S. attorney and attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 24 day of April, 1891. Hartley & Coleman, attorneys for defendants in error. U. S. circuit court. John A. Shields, clerk. Filed Apr. 24, 1891.

3 United States circuit court for the southern district of New York.

PETER WIEDERER & LEONHARD WIEDERER,
against
DANIEL MAGONE.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, this 13 day of October, in the year one thousand eight hundred and eighty-eight.

[L. S.] JOHN A. SHIELDS, *Clerk.*

HARTLEY & COLEMAN, *Plaintiffs' Attorneys,*
Office and Post-Office Address, 62 Wall Street, New York City.

4 (Indorsed:) 2996. United States circuit court, southern district of New York. P. Wiederer et al. vs. D. Magone. Summons. Hartley & Coleman, plaintiffs' attorneys, to the defendant within named. Take notice. That upon default judgment will be taken for the sum of dollars, in money, with interest from the day of , 189 , besides costs. , plaintiffs' attorney. Personally served Oct. 13, 1888. Custom-house, New York.

5 Circuit court of the United States for the southern district of New York.

PETER WIEDERER & LEONHARD WIEDERER,
plaintiffs,
against
DANIEL MAGONE, DEFENDANT.
} Complaint.

Plaintiffs complain:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were during said times partners in trade under the firm name of P. Wiederer & Brother, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiffs, in order to obtain said goods, were compelled to pay the defendant as such collector in excess of the lawful rate of duty on said goods and of the amount required by law the sum of two hundred and four $\frac{00}{100}$ dollars.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals on each entry to the Secretary of the Treasury, who has affirmed the decision of defendant upon said entries.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part thereof.

7th. That said sum so exacted as aforesaid has never been repaid to to plaintiffs, and is still due and owing to them.

Wherefore, plaintiffs demand judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiffs.

6 (Indorsed:) 13040. 2996. U. S. circuit court, southern district of New York. P. Wiederer et al. against Daniel Magone. Complaint and bill of particulars. Hartley & Coleman, plffs' attorneys, 62 Wall street, New York City.

Bill of particulars.

Name of importer (for all importations), P. Wiederer & Bro.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
			1887.	1887.		1887.	1888.	1888.	1888.
Glass for watches and clocks	Bremen	Eider	Aug. 24 & 31	Sept. 15	$29.70	Sept. 15	Apr. 21	Apr. 21	Aug. 7
Do do do	Hamburg	Rugia	" 31	" 21	4.50	" 21	" 4	" 4	July 31
Do do do	do	Rhaetia	Sept. 5	Oct. 3	19.55	Oct. 4	Mar. 28	Mar. 28	" 27
Do do do	do	Moravia	" 20	" 10	29.35	" 11	Apr. 21	Apr. 21	Aug. 7
Do do do	Bremen	Fulda	Oct. 6	" 18	24.30	" 19	June 12	June 12	Sept. 12
Do do do	Hamburg	Lessing	Sept. 20	" 18	21.15	" 18	" 16	" 16	" 4
Do do do	do	Moravia	Oct. 26	Nov. 23	11.25	Nov. 23	May 18	May 18	Aug. 7
			1888.	1888.		1888.			
Do do do	do	Bohenia	Jan. 14	Feb. 3	25.20	Feb. 3	" 23	" 23	" 18
Do do do	do	Lessing	" 25	" 20	23.40	" 21	" 28	" 28	Oct. 10
			1887.	1887.		1887.			
Do do do	do	Marsala	July 1	July 18	15.60	July 18	" 24	" 24	Aug. 18

9 Circuit court of the United States for the southern district of New York.

PETER WIEDERER ET AL.
versus
DANIEL MAGONE, COLLECTOR, ETC. } N. S. 13040.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to

the United States as duties, according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

10 (Indorsed:) 2996. 13040. U. S. circuit court, southern district of New York. Peter Wiederer et al. vs. Daniel Magone, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated, New York, June 12th, 1889. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. To Hartley & Coleman, esqs., attorneys for plaintiffs.

11 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the 15th day of December, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable Alfred C. Coxe, judge.

PETER WIEDERER ET AL.
v.
DANIEL MAGONE. } 13040.

Now come the plaintiffs, by Hartley & Coleman, esqs., their attorneys, and move the trial of this case. Likewise comes the defendant, by Jas. T. Van Rensselaer, esq., asst. U. S. att'y, his attorney. Thereupon a jury is empaneled and the case proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Tuesday, Dec. 16, 1890, the jury retire, and on their return render a verdict, whereby they find for the plaintiffs in the amount of sixty-three dollars and fifty-nine cents ($\$63\frac{59}{100}$).

It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of all proceedings on said verdict for sixty days from Dec. 16, 1890.

An abstract of the minutes.

[L. S.] JOHN A. SHIELDS,
Clerk.

12 U. S. Circuit Court, southern district of New York.

PETER WIEDERER & ALS.
vs.
DANIEL MAGONE. } N. S. 13040.

This action having been brought on trial at the October term of this court, of A. D. 1890, before the Hon. A. C. Coxe, judge, and a jury, and a verdict having been rendered on the 16th day of December, 1890, in

favor of the plaintiff and against the defendant, for the sum of sixty-three dollars and fifty-nine cents ($63\frac{59}{100}$), and the costs of said defendants having been duly taxed in the sum of forty-nine dollars & eighty-five cents, and interest on said verdict from the date of its rendition to this day having been computed in the sum of sixty-eight cents, which said debt, damages, and costs amount in the whole to the sum of one hundred &
13 fourteen $\frac{12}{100}$ dollars, therefore, it is considered that the plaintiff have judgment against the defendant for the sum of one hundred & fourteen $\frac{12}{100}$ dollars aforesaid, and have execution therefore, and it is hereby certified under the statute in such cases made and provided that the defendant had probable cause in making the exaction complained of.

Judgment signed this 23 day of April, 1891.

JOHN A. SHIELDS, *Clerk.*

Verdict.....	$63.59
Int	.68
Costs	49.85
	$114.12

(Endorsed:) 13040. U. S. circuit court, southern district of New York. Peter Wiederer et al. vs. Daniel Magone. Judg't roll. Hattley & Coleman, atty.'s for p'l'ffs, 62 Wall St., City. U. S. circuit court; filed Apr. 23, 1891, 12:10 p. m. John A. Shields, clerk.

14 United States circuit court, southern district of New York.

PETER WIEDERER ET AL.
vs.
DANIEL MAGONE. } N. S. 13040.

Defendant's bill of exceptions.

And afterwards, to wit, on the 15th day of December, 1890, this case came on to be tried before the Honorable Alfred C. Coxe, judge, and a jury duly empanelled and sworn to try the issues herein. The parties appeared by their counsel, Messrs. Hartley & Coleman, for the plaintiffs; and Messrs. Edward Mitchell, U. S. attorney and James T. Van Rensselaer, assistant U. S. attorney, for defendant, and during the course of the trial, and before the rendering of the verdict therein, the counsel for the defendant did take and allege certain exceptions to certain rulings of the court, which said exceptions were by the court duly allowed and are hereinafter specifically set forth.

To sustain the issues upon their part the plaintiffs introduced evidence tending, among other things, to show that as the firm of P. Wiederer & Brother they imported by nine different vessels from Bremen and Hamburg, in Europe, and duly entered at the Port of New York, in nine differ-
15 ent entries, during the months of July, September, October, and November, 1887, and February, 1888, certain merchandise, Ex Eider, September 15, 1887, invoiced as "61 dz. p. pl. glass unsilbert, 4 x $2\frac{3}{4}$, square, and another lot as 84 dz. p. pl. glass unsilbert, $3\frac{1}{4}$ x $3\frac{1}{4}$, part of watches; 222 dz. p. pl. glass unsilbert, $2\frac{1}{2}$ x $2\frac{1}{2}$, part of watches; 156 dz. p. pl. glass unsilbert, 4 x 229-32nds, square, part of watches."

Ex Rugia, September 21, 1887, invoiced as "54 dz. p. pl. glass unsilbert, $6\frac{5}{8}$ x $4\frac{1}{4}$, square; 62 dz p. pl. glass unsilbert, 4 x $2\frac{24}{32}$, square, parts of watches."

Ex Rhaetia, October 3, 1887, invoiced as "55 dz. p. pl. glass unsilbert, $2\frac{1}{2}$ x $2\frac{1}{2}$ round, part of watches; 238 dz. p. pl. glass, unsilbert, 4 x 3, round, part of watches."

Ex Fulda, October 18, 1887, invoiced as "189 dz. p. pl. glass unsilbert, 4 x 4, round, part of watches; 36 dz. p. pl. glass unsilbert, $3\frac{1}{4}$ x $3\frac{1}{4}$, part of watches; 57 dz. p. pl. glass unsilbert, $2\frac{1}{2}$ x $2\frac{1}{2}$, part of watches;" and another lot as "53 dz. p. pl. glass unsilbert, $6\frac{5}{8}$ x $4\frac{1}{4}$, square."

Ex Lessing, October 18, 1887, invoiced as "135 dz. p. pl. glass unsilbert, 4 x 3 square, part of watches; 48 dz. p. pl. glass unsilbert, $2\frac{1}{2}$ x $2\frac{1}{2}$, round, part of watches; 141 dz. p. pl. glass unsilbert, 4 x 4, round, part of watches."

Ex Moravia, November 23, 1887, invoiced as "105 dz. pl. glass unsilbert, 4 x 4, round, part of watches; 17 dz. p. pl. glass unsilbert, square, part of watches."

Ex Bohemia, February 3, 1888, invoiced as "270 dz. p. pl. glass unsilbert, 4 x 4, round, part of watches; 60 dz. p. pl. glass unsilbert, 2 x 2, round, part of watches; 20 dz. p. pl. glass unsilbert, 2 x 2, round, part of watches."

16 Ex Lessing, February 20, 1888, invoiced as "267 dz. p. pl. glass unsilb., 4 x 4, round, part of watches; 119 dz. p. pl. No. 401, 2 x 2, round, part of watches; 30 dz. p. pl., No. 400, round, part of watches."

Ex Marsala July 18, 1887, invoiced as "164 dz. p. pl. glass unsilbert, $6\frac{5}{8}$ x $4\frac{1}{2}$, square." All of which merchandise in the several entries above set forth was classified for duty by the defendant collector as "Articles of glass, cut, 45 per cent ad valorem," under the provision of schedule B of the tariff act of March 3, 1883 (Paragraph T. I. New, 135), as follows: "Articles of glass, cut, engraved, painted, colored, printed, stained, silvered, or gilt, not including plate glass silvered, or looking-glass plates, 45 per centum ad valorem;" that the plaintiffs paid the amount of such duties at said rate to obtain possession of the said merchandise, and within the time provided by law duly protested against the said assessments of duties, claiming that said merchandise was dutiable at 25 per cent ad valorem as "parts of watches and watch materials," or at 30 per cent as "parts of clocks," under Schedule N of said tariff act (T. I. New 414, and 494), as follows: "414. Clocks, and parts of clocks, 30 per cent ad valorem;" and "494. Watches, watch-cases, watch movements, parts of watches, and watch materials, not specially enumerated or provided for in this act, 25 per centum ad valorem."

The protest by the Eider is as followes:

"NEW YORK, *April* 21, 1888.

17 "SIR: We protest against your decision as to the rate and amount of duties to be paid on the looking-glass plates and faces of clocks and watches, entered by us for consumption per Eider, 136,329 from Bremen. Sept. 15, 1887, and per Moravia, 150,619 from Hamburg, Oct. 10, 1887, because the first are dutiable at three cents a square foot, according

to size as cast polished plate glass unsilvered, under tariff schedule B; and the others at 25 per cent as part of watches and watch materials; or at 30 per cent as parts of clocks, under schedule N.

"We pay the excess exacted under compulsion, solely to get the goods.

"P. WIEDERER & BROS.,
"By HARTLEY & COLEMAN,
Attys., 62 *Wall street.*

"COLLECTOR OF CUSTOMS,
"*New York City.*"

The other protests, with the exceptions of dates, names of vessels, and number of entry, were the same in form as the above; that appeals were duly taken to the Secretary of the Treasury in the case of each entry, and that the latter officer duly affirmed the decision of the defendant collector upon said appeals, and this suit was seasonably brought thereupon.

The plaintiffs further produced the evidence of LEONARD WIEDERER, who, being sworn as a witness in behalf of the plaintiffs and examined by plaintiffs' counsel, testified in substance as follows: That he was an importer and manufacturer of mirror plates and plate glasses and
18 some fancy goods; eleven years in the city of New York, by himself, and with his brother about fifteen years; that the firm of Peter Wiederer & Bro. was composed of himself and his brother, Peter Wiederer; was the same since about the year 1885; that his firm made the entries of merchandise above referred to, and also the protests (all of which entries, invoices, and protests were duly received and marked in evidence); that the goods in question paid a duty of 45 per cent (samples representing the goods imported by the Eider offered in evidence and marked Exhibits S-1 to S-4, inclusive).

The following question was then put to the witness by plaintiffs' counsel:

Q. What are they used for?

Being cross-examined by defendant's counsel, the witness testified in substance: That his business was importer of mirror plates and plate glass of different kinds, and besides his firm imported hand mirrors, but their main business was the importing of mirror plates; his brothers in Europe were the manufacturers; his firm imported the goods by contract; he did not buy these goods for domestic manufacturers; the goods were not consigned to him for sale; his firm sold them direct; they bought the goods themselves.

The above question was objected to by defendant's counsel as incompetent, irrelevant, and immaterial. The objection was overruled by the court, to which ruling counsel for defendant duly excepted, which exception was allowed by the court.

19 Q. (read) "What are they used for?"

A. They are used exclusively for clocks.

Witness' firm sold the most to the Ansonia Clock Company, and some to the New Haven Clock Company, but not over 100 dozen to the New Haven Clock Company; we never had one piece in except for a clock company; they are made to special sizes and shapes, and his firm get them just to fit the clock; they are nearly all sold to the Ansonia Clock Company, and a few to the New Haven Clock Company; his firm had dealt years and years with the Ansonia Clock Co.; with the New Haven Clock

Co. they have had a few contracts; his firm's transactions in furnishing goods to these companies had been large and regular—so much every month.

The following question was then put to the witness by plaintiffs' counsel:

Q. Do you know as matter of 'act for what part of a clock this is used?

(Objected to by defendant's counsel on the ground that the competency of the witness has not been shown. The objection was overruled by the court, and an exception duly taken by defendant's counsel, which exception was allowed by the court.)

A. Yes, sir; I do know. They are used for alarm clocks, which are sold for about $1.50 apiece. They are used for cheap clocks, to go in the front and cover the dial plate. They are just pressed in. (Showing witness invoice Exhibit 2.) There are only a few dozen in here. There
20 are fifty-four dozen $6\frac{5}{8}$ x $4\frac{1}{2}$ and 62 dozen 4 x $2\frac{29}{32}$nds; we paid a duty of 45 per cent on them under protest; that the glass was the same thing that the witness testified to before, the same kind of plate and everything; and witness' testimony in regard to the sample already in suit applies to this entry as well as the other. (Showing witness invoice Exhibit 3.) There is one case 55 dozen $2\frac{1}{2}$ x $2\frac{1}{2}$ round; also 238 dozen 4 x 3 square; the samples in suit represent these goods. (Showing witness invoice Exhibit 5.) On one of these there is one case, 6412, 189 dozen 4 x 4 round; 36 dozen $3\frac{1}{4}$ x $3\frac{1}{4}$ round; 37 dozen $2\frac{1}{2}$ x $2\frac{1}{2}$ round; 53 dozen $6\frac{5}{8}$ x $4\frac{1}{8}$; these goods were represented already by the samples in evidence. (Showing witness invoice Exhibit 6.) In case 6383, 133 dozen 4 x 3 square; 48 dozen $2\frac{1}{2}$ x $2\frac{1}{2}$ and 141 dozen 4 x 4 round; that the samples in suit represented these goods also. (Showing witness invoice Exhibit 7.) Here are 10 5 dozen 4 x 4 round; 17 dozen 4 x 3 square; the samples in suit represent these goods. (Showing witness invoice Exhibit 8). One case, 6623, 270 dozen 4 x 4 round; 60 dozen 2 x 2 round; 20 dozen 2 x 2 round; that the samples in suit fairly represented these goods. (Further sample of the goods offered in evidence by plaintiffs' counsel, and marked Exhibit Sample No. 5.) (Showing witness invoice Exhibit 9.) One case, 6663, 267 dozen 4 x 4 round; 119 dozen 2 x 2 round, and 30 dozen 2 x 2 round. (Showing witness invoice Exhibit 10.) 164 dozen 6 x 8 x $4\frac{1}{4}$; that on all these goods a duty of 45 per cent was paid; that the samples in suit are just the same; witness knew that these goods were used for the fronts of clocks.

21 Being cross-examined by defendant's counsel, witness testifies in substance: That in the invoice where he mentioned 6 x 8 x $4\frac{1}{4}$ he made a mistake there; that was $6\frac{5}{8}$ x $4\frac{1}{4}$; that the German word "unsilbert" means unsilvered; that the word "square" indicates that the glass is square, like sample Exhibit 2. We call glass like that all square, no matter whether it is oblong or not; all that has sharp corners we call square; that the goods in case No. 6214 of the Eider were for parts of watches or parts of clocks, I think; that is about the same thing. Exhibits 5 and 2 represent those goods; also Exhibit Sample 1; that Exhibit Sample 5 is a part of the watch. The diameter of that piece of glass is $2\frac{1}{2}$ inches.

Q. Do you mean that this piece of glass Exhibit Sample 5 is part of a watch?

A. Yes, sir.

Q. What is the diameter of that?

A. 3¼ inches. Sample No. 2 is part of the watch; it is a little square clock about this high [illustrating] with three glasses.

Q. Do you understand a clock and watch to be the same thing?

A. It is just a key clock like the round one.

Q. Then those are not parts of watches at all?

A. No, sir.

Q. They are invoiced as parts of watches?

A. We can enter them that way.

Q. Those three samples, then, are no parts of watches?

A. The way you mean, we have to call them parts of clocks. We are under a different understanding about that. Some call them parts
22 of watches and some call them parts of clocks. The clock company even call them that way. There is no sample that represents 6⅝ x 4¼; but the article is represented by a piece of glass [indicating] only of different dimensions, the same glass, the same thickness, and square, and finished exactly as that is.

Q. Then it is not a part of the watch?

A. We call it in two ways; even the clock companies do; they say part of a watch or part of a clock. So that is the reason our German people put on just what they think.

Q. Well, this not part of a watch, is it?

A. No, sir; that is a part of a clock.

In invoice Exhibit 3, the 2½ x 2½ round and 4 x 3 square are represented by Exhibits samples 5 and 2, only a little smaller; the glass 4 x 3 resembles sample 2, only a little different in size; is also invoiced as part of a watch, but it is not part of a watch, it is part of a clock; the largest square piece is about 6⅝ x 4¼—there is no sample of it here, it is part of a clock; the goods in Invoice Exhibit 6, 2½ x 2½, 4 x 4, 4 x 3, are invoiced as parts of watches, but they are not parts of watches, but parts of clocks; so with the goods in Invoice Exhibit 7, invoiced as parts of watches—they are parts of clocks; so of the goods in Invoice Exhibit 8, 2½ x 2 and 2 x 2, invoiced as parts of watches—they are parts of clocks. Witness' firm did not fit these articles in the clocks or watches themselves. When we get the order we get the size and the frame to see that they fit exactly; they are just cut to the size and then they are ground down before we deliver them to the clock or watch makers.

23 Witness did not use articles like samples now in evidence for any other purpose than selling them to clock and watch manufacturers; did not sell them to other parties for other purposes; did probably sell a few little lots, but they were better glass than this; they were not essentially the same as the goods in suit.

Redirect examination by plaintiff's counsel:

The goods described in these invoices as parts of watches and parts of clocks are in every case accompanied by the dimensions showing the exact size of the goods.

By a JUROR. Q. I want to ask you whether there is any difference in German between the word watches and the word clocks?

A. We generally give them the names; we send the name out that they have to invoice it.

Q. In these invoices in the different exhibits where you mentioned different glasses, were all the glasses that you imported, on which you claim that there has been an excess of duty, delivered either to the Ansonia Clock Company or to the New Haven Clock Company?

A. Yes, sir; all of them.

By DEFENDANT'S COUNSEL. Q. Do you know whether these clock or watch companies do or do not grind and shape these glasses before they use them?

A. No, sir; they do not. I know all about it. They do not grind a single piece. I know of my own knowledge, because I am very well acquainted in these companies, and can go to their factories any day if I like to, and I have been there frequently, because we have to speak about these things. He had been in the factories once or twice a year, probably. Witness knew that the company just fit the glasses in; that he knew for sure;
24 had seen it done. There are only five sizes that we deliver, and if I went every day I could not see anything else.

Plaintiffs further produced the evidence of FRANK SCOTT, who, being duly sworn and examined as a witness for the plaintiffs, testified, in substance, that he was in the employ of the Ansonia Clock Company as private secretary to the manager; was acquainted with the plaintiffs through business, ordering glasses of them for clocks; we give them an order to deliver so many glasses every month; they import the glasses from the other side for us, so many different sizes every month; it is a monthly order, we call it; we give the order every year to furnish for twelve months—a standing order; the samples on the desk before me are samples of the same kind that we order from the plaintiffs; these are glasses similar to what we use; we use them to cover clock faces; we put them in the front of nickel clocks, and when so put in they form a part of the clock; the sample (indicating) could be used for a watch two inches dial, but we use it for a two inch dial clock; had been dealing with the plaintiffs four years; witness had been five years in the business, but at first did not have any dealings with the plaintiffs.

Being cross-examined by defendant's counsel, witness testified, in substance, that the circular pieces of glass are put into the front part of a clock to cover the dial; they are put in before the movements; the glasses are put in first and the movement afterwards; the glass is held in place by the movement; it is fastened in place by the movement being
25 pushed against it, and then the movement is screwed in place, and the outside frame keeps it from falling out in front; there is a flange in front; nothing more than the flange in front and the movement behind; nothing was done to the glass, as his company received it from the plaintiffs before it is put into the clocks, absolutely nothing; they do not grind it or shape it in any way; sample 2 is used in what we call a carriage clock, a sort of oblong; used in the face of the clock to cover the dial; the glass is adjusted to the clock with a sort of flange that slides right in; we do do not cut or grind a piece of glass in any way to make it fit; the glass is used exactly as it comes from the plaintiffs; we use the samples for no other purpose; we make bronzes besides clocks; no other articles in which glass is used.

Plaintiffs also offered testimony showing that the amount due to them for overpayment of duties as alleged being the difference between 30% ad valorem on "parts of clocks" and the 45% ad valorem as assessed by the defendant was $58.05, and interest $5.54, making in all $63.59.

To sustain the issues upon his part the defendant produced the testimony of ALEXANDER VOGELEY, who being duly sworn as a witness for the defendant and examined by defendant's counsel, testified, in substance, as follows: That his business was glass-cutter at 64 and 65 South Fifth Avenue, in the city of New York; had been engaged in that business 32 years in New York City; was familiar with the five samples of plaintiffs' glass in evidence; had manufactured articles like those prior to
26 March 3, 1883; they are made of first quality window glass; the glass is cut from sheet glass round with a diamond; then it is ground on a mill with sand to give the shape of the bevel; after the glass is cut it is passed on a horizontal mill on which sand is dropping with water, in order wear the edge and give it the bevel and shape it has; this is done with an iron mill revolving, treated with water and sand; that leaves the bevel of the glass in a rough state; the next process is to work it the same way, but on a stone in the shape of a mill of 26, 28 or 30 inches diameter, revolving, on which water drops all the time and wears off the deep holes made in the glass by the roughing by the sand; it leaves the glass nearly like this, but not polished; the next process is to apply the edge which is not yet polished to a wooden wheel, turning vertically and using ground pumice stone and water for polishing; that leaves the glass as it is here; these samples seem to be touched a little on the edge; that is done either on the iron mill or on the stone, but it is the same process; witness dealt in articles like these samples at and prior to March 3, 1883; they were known in the trade of this country at that time as round glasses of different shapes, three inches, four inches, etc.; witness furnished them to parties in trade at that time, to wholesale dealers and manufacturers in clocks and photographing, and at that time and previously witness did not believe he did anything except for clocks and photographing; they were used at that time within witness' knowledge for other purposes;
27 some were made for photographing, and witness made lots of them years ago of different shapes and sizes; had made them for boxes; for the little brass boxes and wooden boxes used on telegraphic instruments; had made them since 1883, for many other purposes that witness did not now recall; they have been used since 1883 for little fancy banks for children; also for photographing and for various other purposes in small quantities; witness had made them for the purposes of silvering, but not before 1883.

Q. Did you make them for any class of small mirrors before 1883?

A. Well, this is window glass; I never made them out of window glass for mirrors; some of these seem to be crystal glass, and out of crystal glass I did make some; some of them seem to be crystal—these glasses polished on one side, samples 1 and 2; had made articles like samples 1 and 2 before 1883 for hand mirrors, and to put them in ivory frames and metal frames; they were bevelled; they were both square, round, and oval shapes; witness did not recollect that he used them for any other purpose at that time; in 1883 and prior to that time when those articles left his manufactory they were in a finished condition; they were all finished.

Being cross-examined by plaintiffs' coubsel, witness testified, in substance: That the leading use of the round samples was for clocks; they are properly fitted for that purpose; the window glass is for the main part used for clocks, either square or round, but the crystal glass is not; the crystal glasses are used for photographing and for different purposes where
28 glass is required for boxes, and one thing and another; the samples that are used for photographing and for boxes are exhibits samples 1 and 2, not the size, but I mean the quality; it is glass as I have seen it of this size, but in quality of the other; I never saw this size used in photographing, but I have the same quality; witness was not aware that glass exhibit sample 2 is the proper size and shape to be used as a face for clocks; if he had a rule and the size of the clock, he could say; if they are 1-16th of an inch short they won't do; I have have seen them used for other purposes than a clock; all the other samples except 2 were properly fitted, and usually used for back and faces of clocks, and those other two samples in the quality of glass are used for photographing.

Redirect examination by defendant's counsel: Witness had made some like sample exhibit 2 for clocks, and he believed some of the square ones; the crystal glass that he had mentioned had been used for photographing and also for telegraphic boxes or registers; that is exhibit sample 2.

By a JUROR. Q. Is glass of the size of exhibit sample 2 ever used on a telegraphic indicator?

A. I don't know about the size. Witness knew the sizes of a telegraphic stock indicator; they are as small as that; there is one on top and one at both ends sometimes. In relation to photographing, pictures are taken on them; that is, pictures are pasted on them to set up on an easel; they do not print the picture direct on the glass. (Witness produces sample of this kind of glass with a picture.)

29 By another JUROR. Q. You said that some of these samples seemed to be crystal glasses; can't you tell whether they are crystal or whether you only think so? Do you mean to say that in your opinion they are crystal, or do you simply say you believe them to be crystal?

A. Any man who knows anything about an article can see. This glass seems to have been polished, but this one has a window glass defect it it; if witness had polished it himself he could tell.

By DEFENDANT'S COUNSEL. Those two seem to be crystal.

By another JUROR. A. What constitutes crystal glass?

A. Glass which is polished on one side, and sometimes on both sides, and in the other kind you can see defects in the spreading on the stone.

By DEFENDANT'S COUNSEL. The size $6\frac{3}{8}$ x $4\frac{1}{4}$ can be used for various purposes—for photographing or for letter boxes—various purposes, but not exclusively for clocks; witness never had seen any used for clocks any way.

Defendant further produced the evidence of PATRICK J. GALLAGHER, who, being duly sworn and examined as a witness in behalf of the defendant by defendant's counsel, testified, in substance, as follows: That his business was glass cutter at 323 Pearl street; been in that busines' about eleven years, bevelling glass principally; was familiar with goods like plaintiff's samples on and prior to March 3, 1883; had manufactured such

goods; we use the same tools as we do for rich cut glassware—a
30 horizontal mill revolving with sand and water dripping on it; the process we call roughing, and first they are cut in shape with a diamond then the next process is with the horizontal mill with sand and water dripping on it. That leaves it in an unfinished condition—rough. We then use a stone and smooth it. That is the second process; that leaves it still unfinished. Then the next process is a material of wood and powdered pumice, and that polishes and finishes it; the samples before me are bevelled and polished and finished; have known articles like plaintiffs' exhibits in the trade of this country prior to March 3, 1883; had bought the same size and shape; manufactured them for the trade in this country; have manufactured those round ones for the clock trade; the square ones I have manufactured for the plush box manufacturers, brass and leather box manufacturers, carriage trimmers and carriage manufacturers, and for photographers; the samples can be used for any purpose as well as for clocks; I presume they could be used for plush boxes and for toilet articles and for the fancy metal goods trade; I have manufactured small pieces of glass such as these for the fancy metal goods trade and for carriage manufacturers, and also for the leather and plush box trade; witness knew the Ricksecker Perfumery Company; had sold them square glasses about the same quality as this glass is; in witness' opinion this is a very good quality of French window glass; I use first quality of French window glass in making glasses for that concern.

31 Q. It is in evidence that part of plaintiffs' articles are $6\frac{3}{8}$ x $4\frac{1}{4}$; is that a size that you are familiar with?

A. I could not say positively as to the exact size, but I think I have made them for that concern, and they would appear to run about $4\frac{1}{4}$ x $5\frac{3}{4}$, I think about that size; does not know for what purpose the Ricksecker Perfumery Company use that glass; the articles represented by plaintiffs' exhibits samples are a finished article, and it is very good indeed.

Being cross-examined by plaintiffs' counsel, witness testified in substance: I would say the round glasses are consumed largely by the clock trade; had made them for that trade; had at times made quite a number; had made quite a number of round glasses, too, for the fancy-goods trade in metal ware, but I suppose I have made more for the clock trade; it is a fact that in making them for the clock trade I have to make them according to certain sizes and dimensions, and when I make them for the clock companies I make them on an order giving the requisite dimensions; the clock companies usually supply us with a case that they are to be made to fit into; when I make them for photographing I get a sample of the glass and make them according to that size; in each case, whether I make them for photographic purposes or any other purpose, I have a definite pattern to make them by.

By a JUROR. I have made glasses similar to that for clocks; am not positive about the size, but similar to that.

Redirect examination by defendant's counsel: Witness made
32 them for a variety of other purposes, too; as a rule a sample is submitted; very often we get the size; had furnished various lines of goods of that sort to dealers in different sizes; it was an article known in his trade in this country prior to March 3, 1883.

By a JUROR: Q. Have the articles that you speak of had any definite name or term by which they were identified?

A. I never knew any other name than bevelled glass, bevelled circles, or bevelled squares.

Defendant further produced the evidence of THEODORE RICKSECKER, who, being duly sworn and examined as a witness on behalf of the defendant, and examined by defendant's counsel, testified, in substance, as follows: My business is manufacturer of perfumery, at 58 Maiden Lane; it embraces the composition and manufacture of various kinds of toilet articles, as well as perfumery, and the putting of them up in fancy packages; can not say that we manufacture the fancy packages; am familiar with articles like plaintiffs' samples; have been using one shape in our business similar to this Exhibit Sample 2 for the tops of perfumery boxes; does not use them for any other purpose; it has become rather obsolete at the present time; we have used them to a considerable extent for that purpose; does not recollect having used any of the other samples.

Being cross-examined by plaintiffs' counsel, witness testified, in substance: We give a special order for those goods when we want them, specifying the size, not necessarily the kind of glass; in our trade we have not known the technical terms, so we don't do it.

The following question was then put to the witness by plaintiffs' counsel:

33 Q. Would you have been satisfied with such quality of glass as that sample, Exhibit Sample No. 1?

(Objected to by counsel for the defendant on the ground that the witness has stated that he is not dealing in any except such as Exhibit Sample 2. Objection overruled by the court; exception by defendant's counsel, which exception was allowed by the court.)

A. At times, but not at present. Would not have been satisfied with that shape. We wanted them in a particular shape. The particular shape that we desired was to accommodate the bottles that we put into the boxes. The size varied considerably, but some were, as near as I can recollect, about that size. Our dealing in those was not large. For a time we imported the boxes, and then we finally had them made here; had the glasses cut here and had our box-makers put them up for us.

Redirect examination by defendant's counsel: We have used sizes as large as 6⅜ long and 4¼ wide, resembling Exhibit Sample 2. In our imported boxes we had that size. Witness knew of that glass being used on those boxes.

Defendant further produced the evidence of JOSHUA D. DEVOE, who, being sworn and examined as a witness on behalf of the defendant and examined by defendant's counsel, testified, in substance, as follows: My business is glass-cutting, at 124 Baxter street; have been in that business about 25 years; have had experience in bevelling glass; am familiar and was familiar prior to March 3, 1883, with goods like samples in suit;

34 have manufactured articles like those samples prior to March 3, 1883. They were an article of commerce in this country at that time. They went under no trade name or names more than circles or squares. They were a finished article at that time. They were used

for toilet boxes and fancy boxes and for lamps; have done them for Mitchell & Vance for lamps; never saw the lamps, but they were supposed to be for lamps. Can not think at present for what other purposes those articles were used, but know they were used for a great variety of other things. I have silvered them. I have done them both ways, silvered and plain. They were used for miniature frames. I remember now to have made them for carriage lamps.

Being cross-examined by plaintiffs' counsel, the witness testified in substance:

Q. Did you ever hear that any of those articles were used for the faces of clocks?

A. Yes, sir.

Q. Why di'n't you say so on your direct examination?

A. Well, all those things did not come to my mind. The principal use of the article Exhibit Sample No. 3 is for clock glasses; it is used also for toilet mirrors and for different fancy boxes. I should say the principal use was for clock glasses; sample Exhibit No. 1 is used for clock faces; they are mostly used for clocks. The principal use of Exhibit Sample No. 4 is the same. I should say that the glass in all these different samples was alike. I should say it was crystal glass; it is what they call first quality of window glass.

Q. Is that window glass silvered?

A. Yes, sir; I have silvered a great deal of it. It is true that the glass most proper to be silvered is known as plate glass; that is the
35 finest glass. This [indicating] is not plate glass, but plate glass is a good quality, too. This is not plate glass; this is what they call a crystal plate, providing my eyesight is right.

Q. And you say at the same time that they are window glass?

A. Yes, sir.

Q. Then you make no distinction between window glass and plate glass?

A. Of course there are different qualities; there is first quality and second quality; there is also third quality. The glass that I prepared for boxes was made of crystal, and it was made of plate, shaped according to certain orders and directions that I received beforehand as to how to make it, and so with any glass that I cut; I make it according to orders that I receive, to fit it for the purpose for which it was intended to be used; I only cut glass; when I said that I was a manufacturer I meant that I was a glass-cutter; I have made cut-glass tumblers and I have made decanters and picture globes, and everything.

Redirect examination by defendant's counsel: When I manufacture glasses like pliantiffs' samples, I manufacture them in the size represented by plaintiffs' samples; we always take orders that way; I manufacture articles like plaintiffs' samples for silvering, and also plain; they were called circles and squares; some of these samples are circles and some are squares; I think, if my eyesight is correct, that they are all crystal.

36 By PLAINTIFFS' COUNSEL: Q. Did I understand you to say that all the samples you manufactured were of the size and shapes of the plaintiffs' samples?

A. I made all sizes; big plates as well as small plates.

By DEFENDANT'S COUNSEL:

Q. It is in evidence that one of the plaintiffs' importations is of a similar character to Exhibit Sample 2, except that it is 6⅝ inches long and 4¼ inches wide. Were you familiar with a glass of that description?

A. As near as the size that I can think of, it is. I may be a little out of the way, a quarter of an inch, perhaps; I can not keep it in my mind; a glass of that description was used for toilet boxes and different fancy articles in bronze; also for lamps, and they are put in with larger mirrors; of course it is silvering glass; in these toilet boxes, and all those fancy boxes, they are silvered as a general thing.

By PLAINTIFFS' COUNSEL:

Q. Can articles of these small bevels be used in any kind of a frame?

A. We fit the frame to them.

Q. Are they used for anything but clock frames? Are articles with those small bevels made for any other purpose than clock frames?

A. Oh, yes.

Defendant further produced the testimony of ISAAC KAUFMAN, who, being sworn and examined as a witness on behalf of the defendant, and examined by defendant's counsel, testified, in substance, as follows: I am a manufacturer of fancy boxes, spoon-holders, stand mirrors, hand mirrors, &c.; our factory is in Crosby street, near Houston; store 496 Broadway; have been in that business about nine years; am familiar
37 with articles like the samples in suit; am using them in the manufacture of my goods; in the manufacture of all of our goods; plush boxes, fancy boxes, hand mirrors, metal boxes, stand mirrors, broom-holders, and room ornaments of every description; we use those articles in our business, transparent and silvered, both ways; have not used them for any other purposes than those I have mentioned, which include our line of goods; we do an extensive business in New York; the name of my firm is Isaac Kaufman & Brother.

Being cross-examined by plaintiffs' counsel, witness testified, in substance: I have never manufactured glasses for clocks. The glass comes into our factory in the sizes we order it for use; not made according to a design, but according to the pattern and style we want to use it for; they are always bevelled; the frame is done to show the bevel wherever we attach it; we get the glass already silvered, if we use it silvered; our business is entirely in that line of goods; we use articles like these samples, every size from the smallest to the largest; we order the glass exactly to the size, or we buy it whenever the importer may have it in hand.

By a JUROR: Q. Do you know whether you get American or foreign glass?

A. It is according to where we buy it.

Q. When you buy it of importers, do you get it already cut?

A. We get it ready to use in the sizes we want; it is glass of this same quality.

Defendant further produced the testimony of JOSEPH MAN-
38 HEIMER, who, being duly sworn and examined as a witness in behalf of the defendant by defendant's counsel, testified in substance: My business is manufacturer of fancy mirrors, fancy boxes, and

holiday goods, at 542 Pearl street; the firm is S. & J. Manheimer; we import our goods or buy them of domestic manufacturers; am not familiar with samples in this suit in this condition; am familiar with them silvered; in other respects the goods with which I am familiar are similar to those; they may vary for a quarter of an inch; our goods are of all shapes and sizes; we buy them silvered; we use them for hand and stand mirrors, and for decorative purposes, for boxes; I think that would cover all the purposes for which they are used.

Q. How does the thickness of the glass compare with those samples?

A. We have used a great many of this kind, but for certain uses we perfer a different product; we have used them of all widths, but we have used bevels exactly like these.

The court then charged the jury as follows:

Gentlemen of the jury: The plaintiffs in this case are dealers in glass and importers doing business in this city. In the year 1887 they imported glass, bevelled squares and bevelled circles, samples of which have been produced before you. Upon arriving here the collector of the port classified them under the section of the statute to which your attention has been called, which provides substantially for all manufactures of glass. The plaintiffs were dissatisfied with that classification and insisted that they should have been classified under a later section of the same tariff act as "parts of clocks."

39 So, gentlemen, the burden is upon the plaintiff to satisfy you by a fair preponderance of evidence—by evidence which, in your judgment, outweighs, and is entitled to a greater weight than that offered by the defendant—that these articles, samples of which have been shown you, are parts of clocks.

The question is not whether the collector is wrong, except incidentally; the question presented by this protest and the issue for you to determine is: Is the plaintiff right in saying that these articles are "parts of clocks?" If they are not parts of clocks, the defendant is entitled to your verdict, and the plaintiff must satisfy you by a fair preponderance of evidence of the correctness of his contention.

Where Congress in a tariff act designates an article by a particular name, subsequent language in the same act of a general character, although broad enough to cover the article, would have to give way to the specific designation; in other words, the specific language would take precedence of the general language, although both might cover the article. So it may be said that the language "parts of clocks" is more specific than the general language, "manufactures of glass." To illustrate, if we take a part of a clock about which there can be no dispute, the dial-plate with the figures already printed on it, for instance, an article that could be put to no other use than as a part of a clock, I think there could be no dispute that such an article would come in under this section of the statute rather than a manufacture of iron or brass, or whatever the material

40 might be of which the dial was made. And I think I will say to you that in determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That would not,

in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury "that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute, and that if the article were (in that case) hat trimmings, chiefly used for making and ornamenting hats, the jury should find a verdict for the plaintiffs."

And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles—all, or one or more, as the case may be, which have no distinguishing characteristic, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of
41 clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant.

So upon this evidence it is for you to say—and I think I will submit all of these samples to you with the instructions that you are to say with regard to all of them whether or not they are parts of clocks. If you say that all are parts of clocks, your verdict will be for the plaintiff in the sum of $63.59. If you say that none of them are principally and chiefly used as parts of clocks, your verdict will be for the defendant. If, however, you say that some of them are parts of clocks and others are not, you will please designate by a special verdict which of them you say should be so classed as parts of clocks.

Your attention has been called to the evidence, and it is not necessary to recapitulate it. The plaintiff has testified that these articles were imported exclusively as parts of clocks and sold to the Ansonia Clock Company and to the New Haven Clock Company for that purpose. Mr. Scott, of the Ansonia Clock Company, testified that they were so used. On the other hand, you have had several witnesses who have had experience in cutting and manufacturing glass in this country, who have testified that these articles, or articles precisely similar in size, shape, and bevel, have various uses to which they are as applicable as in the manufacture of clocks—that is, that they are used in photography; as parts of telegraphic instruments, for coach lamps, and very largely in the fancy box
42 and metal trade.

Therefore, gentlemen, it is for you to take these articles and say whether or not they are parts of clocks, and if you say that some of them are and some of them are not, you will so designate by your verdict.

Defendant's counsel requested the court to charge the jury as follows:

(1) If the jury shall find that articles like the plaintiffs' importations were used at and prior to the passage of the tariff act of March 3, 1883, or at the time of their importation for other purposes than in the manufacture of clocks and watches, they must return a verdict for the defend-

ant, even though they reach the conclusion that the articles in these particular importations were designed to be used in the manufacture of clocks and watches.

Which the court declined to charge in this precise form, to which refusal defendant's counsel duly excepted, which exception was allowed by the court.

(2) In order to find a verdict for the plaintiffs, the jury must be convinced by a fair preponderance of proof that the articles imported by the plaintiffs were used in trade exclusively as parts of clocks, or parts of watches. The mere fact that the articles may be so used does not render them parts of clocks or parts of watches within the meaning of the tariff act, if like articles were suitable to be used, and were actually used at the time of the passage of the tariff act or at the time of their importation in the manufacture of other goods.

43 Which the court declined to charge further than he had already charged on that subject; to which refusal defendant's counsel duly excepted, which exception was allowed by the court.

(3) If the jury find that the plaintiffs' importations have been advanced from a rough state by hand labor or by machinery into the condition of a product known to the trade, and bought and sold in the condition in which plaintiffs' goods were at the time of their importation, the jury must find that the goods are manufactures of glass, and dutiable at the rate under which they were classified by the collector, unless convinced by a fair preponderance of proof that the articles were used in trade and commerce solely in the manufacture of watches or clocks.

Which the court declined to charge as above requested, to which refusal defendant's counsel duly excepted, which exception was allowed by the court.

(4) If the jury find that the merchandise in question has been so advanced by hand labor, or by machinery, as to have become a product bought and sold in trade at the time of the passage of the tariff act, and that the articles of glass have been cut, the jury must find them to be dutiable at the rate classified by the collector; or if the jury shall find that the plaintiffs' importations are either manufactures of glass or articles of glass cut, they must find a verdict for the defendant, unless they are convinced by a fair preponderance of proof that the merchandise was exclusively used in the manufacture of watches or clocks, the presumption being in favor of the correctness of the classification by the collector.

44 Which the court declined to charge as above requested, to which refusal defendant's counsel duly excepted, which exception was allowed by the court.

(5) If the jury shall find that certain of the plaintiffs' importations were used exclusively as parts of watches or clocks, and certain of the articles were not so used, they should render a verdict for the plaintiffs as to the articles used exclusively as parts of watches or clocks, and for the defendant as to the articles not exclusively so used.

By the COURT: I think I have covered that by my instructions to the jury, and I decline to charge further than I have on that subject.

To which refusal the defendant's counsel duly excepted, which exception was allowed by the court.

Defendant's counsel excepted to so much of the charge as stated that the principal or chief use of the articles would determine their tariff classification and that if the jury should find that none of the articles are principally and chiefly used as parts of clocks, their verdict should be for the defendant.

The jury thereupon rendered a verdict for the plaintiffs for $63.59.

And forasmuch as the exceptions, matters and things aforesaid would not otherwise appear by the record, I have settled and signed this bill of exceptions on the prayer of the said defendant by his counsel,
45 and it is ordered that the same be filed as a part of the record herein, with like force and effect as if the same had been reduced to writing, signed and filed before the cause was given to the jury.

Witness my hand at the city of New York this 7th day of April, 1891.

ALFRED C. COXE, U. S. J.

We consent that this bill of exceptions as herein amended be signed and filed.

New York, April 3, '91.

HARTLEY & COLEMAN,
Plff's. Attys.

46 (Indorsed:) N. S. 13040. U. S. circuit court, southern district of New York. Peter Wiederer et al., versus Daniel Magone. Defendant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. U. S. circuit court. Filed April 7, 1891, John A. Shields, clerk.

47 Supreme Court of the United States.

DANIEL MAGONE, PLAINTIFF IN ERROR,
vs.
PETER WIEDERER AND LEONHARD WIEDERER, defendants in error.
} Assignment of errors.

Afterwards, to wit, on 21st day of May, 1891, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error by Edward Mitchell, U. S. attorney (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
U. S. Attorney and Attorney for Plaintiff in Error.

48 (Indorsed:) 13040. United States Supreme Court. Daniel Magone, plaintiff in error, vs. Peter Wiederer et al., defendants in error. Assignment of error. Edward Mitchell, U. S. attorney and attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 24th day of April, 1891. Hartley & Coleman, attorney for in error, to Hartley & Coleman, attorney for defendants in error. U. S. circuit court. Filed Apr. 24, 1891. John A. Shields, clerk.

49 Supreme Court of the United States. October term, 1890.

DANIEL MAGONE, PLAINTIFF IN ERROR,
vs.
PETER WIEDERER ET AL. } 13040. Joinder in error.

And afterwards, to wit, on the 21st day of May, A. D. 1891, in said term, the said defendant in error, by Edward Hartley and Walter H. Coleman, their attorneys, come here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Attorneys for Defendants in Error.

50 (Indorsed:) 13040. United States Supreme Court. Daniel Magone, plaintiff in error, vs. Peter Wiederer et al., defendants in error. Joinder in error. Edward Hartley and Walter H. Coleman, attorneys for defendants in error. Due service of a copy of the within joinder in error is hereby admitted this 19 day of May, 1891. Edward Mitchell, attorney for plaintiff in error. To E. Mitchell, esq., attorney for plaintiff in error. U. S. circuit court. Filed May 19, 1891. John A. Shields, clerk.

51 United States of America, ss: To Peter Wiederer and Leonhard Wiederer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 21st day of May, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel Magone is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated April 23, 1891.

E. HENRY LACOMBE,
U. S. Circuit Judge.

52 (Indorsed:) E & A A 987. 13040. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Peter Wiederer et al., defendants in error. Citation. Edward Mitchell, U. S. attorney and attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 24 day of April, 1891. Hartley & Coleman, attorneys for defendants in error. U. S. circuit court. John A. Shields, clerk. Filed Apr. 24, 1891.

(Indorsement on cover:) Supreme Court, U. S. Received May 21, 1891. Clerk's office. No. 178. 14655. Daniel Magone, collector of the port of New York, plaintiff in error, vs. Peter Wiederer and Leonhard Wiederer. S. New York, C. C. U. S. Filed May 21st, 1891.

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY,
CLERK.

CASE No. 14655.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

DANIEL MAGONE, COLLECTOR OF THE port of New York, plaintiff in error,
v.
PETER WIEDERER ET AL. } No. 178.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

DANIEL MAGONE, COLLECTOR OF THE port of New York, plaintiff in error,
v.
PETER WIEDERER ET AL. } No. 178.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid under protest. The importations were made in 1887 and 1888, so that the case is governed by the tariff law of 1883. It was tried December 15, 1890, before Judge Coxe and a jury. A verdict was found in favor of the importers, and the collector assigns error.

STATEMENT OF FACTS.

The articles in question are round, square, and oblong pieces of crystal glass, made in special sizes and shapes.

They were invoiced as "glass unsilbert, square [or round], parts of watches," (pp. 7-8). Some of them were claimed in the protest to have been dutiable as "cast polished plate glass, unsilvered," (pp. 8-9. This, however, cut no figure in the case, (p. 13, top). The articles now in question are claimed in the protest to have been dutiable either under paragraph 494 as:

> Watches, watch cases, watch movements, *parts of watches and watch materials*, not specially enumerated or provided for in this act, 25% ad valorem.

or under paragraph 414 as:

> Clocks and *parts of clocks*, 30% ad valorem.

On the trial the former claim was dropped (p. 13, top), and the latter successfully relied upon.

The collector classified them under paragraph 135:

> *Articles of glass*, cut, engraved, painted, colored, printed, stained, silvered or gilt, not including plate glass silvered, or looking-glass plates, 45% ad valorem.

There was little or no dispute at the trial about the facts of the case. Plaintiffs' theory was that the classification of articles under paragraphs 414 and 494 was to be determined by the intent of the importer and the *actual subsequent use of the very articles imported.* The collector took the position that articles should be classified under those paragraphs only if *belonging to a class used exclusively* in trade and commerce for the purposes therein mentioned. The court adopted the test of *chief use,* relying upon the hat trimmings cases. It was undisputed that plaintiffs imported the glass for the purpose of selling it

to clock manufacturers, and that the glass imported was actually used for clock faces. It was equally undisputed that the articles were such as in trade were familiarly used for a large number of other purposes. It was undisputed that the chief use of the round glasses was for clocks. There was no evidence as to the chief use of the other glasses. They were cut glass (p. 13).

Plaintiffs' testimony tended to show that the glasses imported by them were all imported for the purpose of sale to the Ansonia Clock Company or to the New Haven Clock Company (p. 12); that they were actually used by those companies for clock faces, being made in special shapes and sizes to fit for that purpose, and pressed into the clocks without any cutting, grinding, or other alteration, but precisely as imported (pp. 9, 10, 12); and that the glasses were called indifferently "parts of watches" or "parts of clocks" (p. 11). The latter is rather a characteristic example of the kind of evidence we get from importers upon the issue of commercial designation. It is, perhaps, not unlikely that these particular designations have never been used in any commercial transactions not immediately connected with the custom-house. The point has no importance in this case, however.

Defendant's testimony tended to show that the articles were sold not only to clock makers (pp. 13, 14, 15, 17), but also to photographers (pp. 13, 15), and for telegraph instruments (p. 13), children's toys (p. 13), carriage trimmings (p. 15), lamps (pp. 17, 18), ornaments about large mirrors (p. 18), and other room ornaments (p. 18), broom holders (p. 18), and fancy boxes and fancy goods in

general (pp. 15–18). It appeared that they were known to the trade simply as round glasses (p. 13), bevelled glasses, bevelled circles, or bevelled squares (p. 16), or simply circles and squares (p. 16). It appeared that they had been used to a considerable extent by the Ricksecker Perfumery Company for tops of perfumery boxes (pp. 15, 16), and by Mitchell & Vance for lamps (p. 17). Isaac Kaufman, a "manufacturer of fancy boxes, spoon holders, stand mirrors, hand mirrors, etc.," testified that he was "familiar with articles like the samples in suit; am using them in the manufacture of my goods; in the manufacture of all our goods; plush boxes, fancy boxes, hand mirrors, metal boxes, stand mirrors, broom holders, and room ornaments of every description; * * * have not used them for any other purposes; * * * have never manufactured glasses for clocks. The glass comes into our factory in the sizes we order it for use. * * * Our business is entirely in that line of goods; we use articles like these samples, every size, from the smallest to the largest; we order the glass exactly to the size, or we buy it whenever the importer may have it in hand. * * * Q. When you buy it of importers, do you get it already cut? A. We get it ready to use in the sizes we want; it is glass of this same quality" (p. 18).

ASSIGNMENTS OF ERROR.

We call attention to the following assignments of error:

Charge to the jury: The court directed the jury that it would not be necessary for them to find an exclusive use for clock makers' purposes in order to sustain plaintiffs' contention. Referring to the decision of the Supreme

Court in one of the hat trimmings cases, the court then used the following language:

> And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. * * * If you say that none of them are principally and chiefly used as parts of clocks, your verdict will be for the defendant (p. 20).

The exception on this point is stated as follows:

> Defendant's counsel excepted to so much of the charge as stated that the principal or chief use of the articles would determine their tariff classification, and that if the jury should find that none of the articles are principally and chiefly used as parts of clocks, their verdict should be for the defendant (p. 22).

Refusals to charge: We call attention particularly to the following refusals:

> 2. In order to find a verdict for the plaintiffs the jury must be convinced by a fair preponderance of proof that the articles imported by the plaintiffs were used *in trade* exclusively as parts of clocks, or parts of watches. The mere fact that the articles may be so used does not render them parts of clocks or parts of watches within the meaning of the tariff act, if like articles were suitable to be used, and were actually used at the time of the passage of the tariff act, or at the time of their importation, in the manufacture of other goods.
>
> Which the court declined to charge further than he had already charged on that subject; to which refusal defendant's counsel duly excepted, which exception was allowed by the court (p. 21).

3. If the jury find that the plaintiffs' importations have been advanced from a rough state by hand labor or by machinery into the condition of a product known to the trade, and bought and sold in the condition in which plaintiffs' goods were at the time of their importation, the jury must find that the goods are manufactures of glass and dutiable at the rate under which they were classified by the collector, unless convinced by a fair preponderance of proof that the articles were used *in trade and commerce* solely in the manufacture of watches or clocks.

Which the court declined to charge as above requested; to which refusal defendant's counsel duly excepted, which exception was allowed by the court (p. 21).

ARGUMENT.

I.

The *intent of the importer* and the *actual subsequent use of the articles imported* are not the test of the statute.

We do not understand that the court took any position inconsistent with this proposition. The actual intent and use of these particular pieces of glass is not alluded to in the charge, except as evidence bearing on the issue of chief use. The assistant district attorney may have intended to raise the point by objecting, at page 9, to the question, "What are they used for?" The question was, however, ambiguous, as it might have referred to the actual use of the particular articles imported, or to the general use of all similar articles. It is not clear whether the assistant district attorney brought out the distinction, and it is not clear how the court interpreted the question in overruling the objection to it. At the close of the

charge the assistant district attorney asked an instruction involving this question, but the request was inartificially drawn, and the court simply "declined to charge in this precise form." While the jury may have been influenced through his failure to point out this distinction clearly, nevertheless we believe it to have been recognized by the court.

The proposition is certainly a well settled one, the leading case having been, indeed, decided under the very same paragraph of the tariff of 1883. This case, *Worthington* v. *Robbins*, 139 U. S., 337, related to certain enamel claimed by the collector to be dutiable as "watch materials." The case was different from the case at bar in one respect, namely, that the enamel there in question could not be used in watchmaking without changing its present form and condition by grinding or pulverizing, so that its condition as imported afforded no evidence of the use to which it was to be applied. The decision was based partly on this ground. The plaintiff in error, however, insisted that the intent of the importation and the actual subsequent use of the imported article were the true tests, so that by proving that the enamel was imported for use by watchmakers, he was entitled to have it assessed under the watch-material paragraph. To that extent the case is directly in point here. We quote at length from the opinion of Mr. Justice Blatchford (pp. 340, 341):

> By the statement of agreed facts, the article was, when the tariff act applying to it was enacted, known and described in trade as "white hard enamel" and "is used for various purposes, including the making of faces or surfaces of watch dials, scale columns of ther-

mometers, faces or surfaces of steam-gauge dials, and for other purposes, when a smooth or enamelled surface is desired." It thus appears that it is *not used exclusively* for the making of faces or surfaces of watch dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials, and was in fact so used, *there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used.*

It appears further that the form or condition of the merchandise as imported affords no evidence or indication of the use to which it is to be applied; that, in the form or condition as imported, it can not be used for any of the purposes mentioned, nor for any purposes whatever of practical use to which it is adapted or ever applied; and that, before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture be applied.

It is apparent, from the facts stated, that the customs officers could not determine from an examination of the article to which of the uses named it was to be applied, or that it was to become the material of a watch. *In order to produce uniformity in the imposition of duties the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported.* In order to be dutiable as "watch materials" the article, when imported, must be in such form of manufacture as to show its *adaptation* to the making of watches.

The article in question was, to all intents and purposes, raw material. If it were to be classed as "watch materials" it would follow that any metal which could ultimately be used, and was ultimately used, in the manufacture of a watch, but could be

> used for other purposes also, would be dutiable as "watch materials." In order to be "watch materials" the article must in itself bear marks of *special adaptation* for use in making watches. *The fact that the article in question was used in the manufacture of watches has no relation to the condition of the article as imported, but to what afterwards the importer did with it.*

This case was followed in *Dwight* v. *Merritt*, 140 U. S., 213, 219 and *United States* v. *Schoverling*, 146 U. S., 76, 82.

The rulings in the Robbins case as bearing on the case at bar may be stated as follows: First, that the intent of the importer is immaterial; second, that the subsequent use of the article imported is immaterial; third, that the test of classification is adaptation or adaptability, to be ascertained by inspection at the custom-house; fourth, that this test must be met by showing an exclusive use. Exactly what is meant by exclusive use it was not necessary in the Robbins case to decide. This matter will be discussed under III, *infra*.

This question of *actual subsequent use* was discussed by the court in the well-known hat-trimmings case of *Hartranft* v. *Langfeld*, 125 U. S., 128, 134,135. In that case the trial court had charged the jury that they were to consider the use to which the trimmings "are chiefly applicable and for which they were employed." The Solicitor-General criticised this language, saying that it "would require the collector to suspend the assessment until he should know how the goods were used or employed. That use or employment of the goods might not take

place for years after the importation was made. The law clearly did not intend the classification should be required to await such an uncertain event." Mr. Justice Matthews said in answer to this: "This is hypercritical. The language does not admit of any such construction. It means for which they were habitually employed, or customarily employed, or usually employed, and not 'for which they had been employed.'"

The question was fully discussed here at the last term of court in the manure-salt case. (*Magone* v. *Heller*, 150 U. S., 70.) That case involved the construction of the statutory phrase "substances expressly used for manure." Judge Lacombe had directed a verdict for the importers in that case, holding actual subsequent use to be the test. (*Heller* v. *Magone*, 38 Fed. Rep., 908.) Judge McKennan in *Schultz* v. *Cadwalader*, 43 Fed. Rep., 290, following Judge Lacombe with some hesitation, had charged the jury to apply the same test, and also to consider the intent and purpose of the importation. The importer's counsel in this court, in support of Judge Lacombe's ruling, insisted that the test was "the personal or utilizing circumstances attending the importation, and the object which will be subserved by it." The court, however, overruled this contention, reversing the judgment and saying through Mr. Justice Gray (p. 74):

> The qualifying words are not "expressly intended for use as manure," or "expressly imported for use as manure," or "in fact to be used as manure," and can not therefore be tested by the intention of the importer or by the use to which the goods are afterwards actually put. But the words are "expressly

used for manure," and the question whether the imported articles come within the description is to be determined at the time of importation.

The judgment in *Schultz* v. *Cadwalader* was thereupon reversed by consent of counsel. (154 U. S., 496.)

The argument made on behalf of the Government in *Magone* v. *Heller* was the same as that made as above quoted in *Hartranft* v. *Langfeld*. It was shown that the test of actual subsequent use was unreasonable as necessitating great circuity of procedure and difficulty of proof. The collector must always collect the highest duty, because he can not, of course, tell for certain how the article is going to be used. Whenever any particular lot imported has been actually used, a *quasi*-judicial proceeding will be had before him to decide whether the use can be satisfactorily proved to be such as to bring the article within the exemption. If so, then the Government suffers a loss of interest on the amount of the duty for the period in which the article is being used. Such a test is a simple one to apply upon the trial of a lawsuit several years after the importation, but will be impossible to practically administer at the custom-house. Being impossible to the extent of absurdity, it is plainly inadmissible within the authorities. (*Arthur* v. *Butterfield*, 125 U. S., 70, 76; *Heydenfeldt* v. *Daney Gold Company*, 93 U. S., 634, 638; *Holy Trinity Church* v. *United States*, 143 U. S., 457, 460.)

The intent of the importer is also a criterion so invisible that Congress can not be presumed to have intended it (and never has been presumed to intend it) except in a very clear case. It gives an advantage to the dishonest importer over the honest one, for he may change

his intent as soon as the goods have passed through the custom-house. (*United States* v. *Eleven Horses*, 30 Fed. Rep., 916.)

There is, for obvious reasons, a continual pressure by the importers upon the courts to establish precedents which will make the special circumstances peculiar to each given invoice govern its classification. The importer naturally desires his invoice to be classified by evidence the sources of which are largely under his own control. He argues that the statute requires the custom-house authorities to ascertain the origin or actual cost of his own particular goods, or his own mental operations at the time of the importation, or to watch the goods in his store-house and trace them through the hands of the jobber and the retailer into that of the consumer. The most recent instance of this tendency is found in *Muser* v. *Magone*, 155 U. S., 240, 250. It is respectfully submitted that the test established in the Robbins case is the correct one.

II.

Assuming that the intent and ultimate destination of these particular pieces of glass is not important, but that they are to be classified just like all other similar pieces of glass by whomsoever imported and for whatsoever purpose, the question now arises: By which out of their many uses are they to be classified?

It appears entirely undisputed in the record that bevelled squares and bevelled circles like those imported are used for many different purposes. They may be sold to clock makers, to makers of photographers' or tele-

graphers' instruments, to carriage makers, to manufacturers of fancy boxes, or to perfumers. They are known in trade and commerce in all these different ways.

As to the squares, it does not even appear that they had any "chief use" at all.

As to the bevelled circles it appeared pretty satisfactorily that their "chief use" was for clock makers, as claimed by the importers. But, simply because bevelled circles of crystal glass are used more by clock makers than by instrument makers or fancy-box manufacturers, are they to be imported for the latter industries under the name of "parts of clocks" at a low rate of duty? Was the round glass top of a fancy perfumery box considered by Congress to be part of a clock, and must the custom-house authorities therefore classify it by that name?

The case at bar was tried before the decision of the Robbins case. Having no authority nearer in point the learned judge considered himself bound by the early hat-trimmings case of *Hartranft* v. *Langfeld*, 125 U. S., 128. If it had not been for the latter decision probably his ruling would have been different.

It may be argued that the Robbins case, so far as it applies the test of exclusive use, is in conflict with the prior hat-trimmings cases which have been subsequently reaffirmed by this court, and therefore should be regarded as overruled. For this reason, of course without questioning the authority of the hat-trimmings cases as giving the true construction of the hat-trimming paragraph, it becomes necessary to discuss the applicability of their doctrine of "chief use" to other and differently worded sections of the statute.

It will be noticed that the hat-trimmings section is quite different in form from that now under consideration. It relates to "hats, and so forth, materials for; * * * trimmings * * * *used for* making or ornamenting hats," &c. The peculiarity of the paragraph is the presence of the words "used for," unqualified by any adverb. All parties at one time assumed the unexpressed adverb to be "chiefly," and the court, without discussion, approved this construction; subsequently the Government energetically attacked it, attempting to substitute the adverb "exclusively," but the court held the construction previously adopted to be too well settled for further question.

It is a curious fact that this unexpressed adverb "chiefly" has become imbedded in the hat-trimmings paragraph without the question ever having been argued before this court as a case of first impression.

The first hat-trimmings case was *Arthur* v. *Zimmerman*, 96 U. S., 124. In that case the adverbial question did not arise, as it appeared that the braids in the suit were "used exclusively for enamelling hats and bonnets."

The next hat-trimmings case was *Hartranft* v. *Langfeld*, 125 U. S., 128. This was the case in which the trial judge adopted the doctrine of "chief use," and the correctness of that doctrine seems to have been disputed at *nisi prius*. It was, however, conceded by the Solicitor-General in this court to be correct, and the court therefore had no benefit of any discussion about it further than what was contained in the brief filed by Mr. Choate on behalf of defendant in error. The questions litigated here

were different, and the "chief use" point is touched only in a few words at the end of the opinion of Mr. Justice Matthews (pp. 135, 136):

> The contention which appears to have been made on behalf of the Government on the trial of the cause, that these velvet ribbons could not be classified as trimmings used for making or ornamenting hats * * * unless they were shown to have been used exclusively for that purpose, is not insisted upon by the Solicitor-General in this court. It was very properly abandoned, the charge of the court upon that point being, in our opinion, clearly right.

The next hat-trimmings case was *Robertson* v. *Edelhoff*, 132 U. S., 614. In that case no question of "chief use" arose. Mr. Justice Blatchford states the matter as follows (p. 616):

> On the trial the undisputed evidence was that the articles in question were used *exclusively* as trimmings for ornamenting hats and bonnets, and had a commercial value *only* for that purpose. The defendant offered no evidence on that subject in contradiction of that put in by the plaintiffs. At the close of the testimony the defendant asked the court to direct a verdict in his favor, upon the ground that the foregoing provision in Schedule N in regard to "hats, and so forth, materials for," should be construed as embracing only articles made of a substance or material not elsewhere specially enumerated or provided for in the act of 1883, and articles made only of straw, chip, grass, palm leaf, willow, hair, whalebone, or some other like substance or material; but this request was denied by the court, and the defendant excepted.

The first hat-trimmings case in which the doctrine of "chief use" was attacked by the Government in this court, or presented here for decision, was *Cadwalader* v. *Wanamaker*, 149 U. S., 532. The court, by Mr. Justice Shiras, said (pp. 540, 541):

> A very earnest and able effort has been made on behalf of the Government to lead us to reconsider the doctrine of those cases. [*Hartranft* v. *Langfeld* and *Robertson* v. *Edelhoff*.] We have read with care the elaborate briefs submitted to us by the Solicitor-General, but as we are unable to accept the conclusions there urged upon us, nothing would be gained by a minute discussion of the several arguments advanced. If the subject had come before us unembarrassed by previous decisions it would have been worthy of a more thorough discussion. As it is, we are content to abide by the views that have heretofore prevailed in this court expressed in two unanimous decisions.

Apparently the remark as to *two* unanimous decisions does not fully apply to the "chief use" point, as the court had already pointed out (p. 540) that this had not been involved in the Edelhoff case.

Similar decisions were rendered at the same time in *Walker* v. *Seeberger*, 149 U. S., 541, and *Hartranft* v. *Meyer*, 149 U. S., 544. In the latter case, referring to instructions based upon the doctrine of "chief use," Mr. Justice Shiras said (p. 547):

> We are unable to see anything objectionable in these instructions, and the charge must be deemed a sound exposition of the law, if the previous decisions of this court, whose rulings the learned judge had in view, are to stand. Conceding there is force in the views so ably urged in behalf of the Government, for

> the reasons given in the case of *Cadwalader* v. *Wanamaker, supra*, we adhere to the conclusions reached in the cited cases, and the judgment of the court below is accordingly affirmed.

Mr. Justice Brewer rendered a separate opinion, concurring in the Cadwalader and Walker cases, and dissenting in the Hartranft case, in which opinion Mr. Justice Brown joined. The opinion intimates doubt as to the correctness of the earlier hat-trimmings cases in principle, but holds that it is too late to reconsider, partly on the ground that they relate to statutes already repealed, and therefore are no longer of present importance (p. 547):

> The questions presented in them are not constitutional, nor even of general and permanent law, but relate only to the scope and meaning of certain statutory clauses now repealed and which were in force for only a few years. While the amounts involved may be, as counsel contend, large, yet the questions are but of temporary and passing importance. * * * The end of litigation, so much to be desired, is not fully satisfied by the close of the particular suit, but implies that the question involved therein is settled; so settled that all parties may adjust their dealings and conduct accordingly.

The argument of Mr. Choate in *Hartranft* v. *Langfeld* was mainly based upon the presence in the hat-trimmings paragraph of the words "used for," and the absence of any limiting adverb. It is respectfully submitted that to clauses like the present, where such words do not occur, the principle of the hat-trimmings cases does not extend, but the test established in *Worthington* v. *Robbins* is to

be applied. The test of "chief use" is one almost impossible of proper application, and which therefore should not be imported into a statute by construction unless the language of the statute forces such a result. What is the "chief use" of an article is a matter not only resting in opinion, but almost beyond the ken of expert testimony. An expert, to be qualified to answer such a question, must have a most extraordinary knowledge of all the industries of the United States. Even then, his testimony as to the relative percentage in use by the clock makers, or the carriage makers, or the perfumers, or the other fancy-box people, can be little more than a guess. He can not prepare himself for his task by any present investigation, for the question relates to the state of affairs which existed on March 3, 1883. (*Curtis* v. *Martin*, 3 How., 106, 110; *Rossman* v. *Hedden*, 145 U. S., 561, 570; *Cadwalader* v. *Zeh*, 151 U. S., 171, 179.) On a matter thus resting in guess, the collector can feel no security in relying on the opinion of such experts as he may retain for the purpose of classification at the custom-house, as required by the Robbins case, "by an examination of the imported article itself in the condition in which it is imported." An article used entirely for clocks in the neighborhood of New York may have a much greater use in the rest of the country for other purposes, yet it is a general use over the whole country that must be looked to when we are considering a United States statute. (*Maddock* v. *Magone*, 152 U. S., 368.) Yet if the collector can not classify the goods with any confidence, all the business of the country is disarranged. "Importations from foreign countries are nec-

essarily made with reference to the duties to be paid upon their entry into the ports of this country. If these are not reasonably uniform and can not be ascertained, the transaction of business will be impossible. No man can determine whether his venture will enrich him or make him a bankrupt." (*Arthur* v. *Morrison*, 96 U. S., 108, 110; see also *Hartranft* v. *Meyer*, 149 U. S., 544, 547.) The experience of all juries in applying the "chief use" doctrine in hat-trimmings cases has been in conformity with these views. Immense numbers of expert witnesses have appeared on each side with testimony absolutely conflicting; and the juries have found the same question sometimes for the Government, sometimes for the importers, sometimes part for one and part for the other.

III.

Assuming, then, that mere "chief use" as laid down by the trial court in the present case is not the correct test, the question remains: To what degree must the use be shown to be exclusive in order to bring the article within the special provisions relating to watch materials or parts of clocks? In the first, fourth, and fifth requests for instructions in the case at bar the assistant district attorney presented the test of absolutely exclusive use. In the second and third requests he presented the test of exclusive *commercial* use; "that the articles imported by the plaintiffs were used in trade exclusively as parts of clocks or parts of watches;" "that the articles were used in trade and commerce solely in the manufacture of watches or clocks."

This latter test does not debar imported materials from the benefits of the watch and clock material clauses simply because they are occasionally, by way of experiment or otherwise, used for other purposes It does, however, require the importers to show that their goods are not known in commerce except in this connection.

It is respectfully submitted that this test is the correct one; and that if the jury believe the bevelled squares and bevelled circles to be known in commerce as materials for other manufactures than those of clocks and watches, the articles are relegated to the general provisions of the statute relating to glass wares.

This would give the clock and watch material paragraph a construction similar to that given by this court to the paragraph relating to "substances expressly used for manure" (*Magone* v. *Heller*, 150 U. S., 70, 75):

> The result of these considerations is that in this act the phrase "expressly used for manure" is equivalent to "used expressly," or "particularly," or "especially" for manure; and denotes those substances the only common use of which, either by themselves or in combination with other materials, is for the purpose of fertilizing the soil. If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally or by way of experiment it is used for a different purpose will not take it out of the exemption. But if it is commonly, practically, and profitably used for a different purpose, it cannot be considered as "expressly used for manure," even if in the majority of instances it is so used.

IV.

As the articles do not come within the paragraphs named in the protest, it is immaterial to consider whether or not they were properly classified by the collector. Plaintiffs must stand or fall by their protest. (*Herrman* v. *Robertson*, 152 U. S., 521; *Presson* v. *Russell*, 152 U. S., 577.) They were plainly, however, "glass cut."

It is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Office Supreme Court, U. S.
FILED.
JAN 17 1895
JAMES H. McKENNEY,
CLERK.

U. S. Supreme Court.

DANIEL MAGONE, Collector, &c.,
Plaintiff in Error,

vs.

PETER WIEDERER ET AL.

October Term,
1894.

No. 178.

BRIEF OF DEFENDANT IN ERROR.

Statement.

The statement of the testimony by the plaintiff in error is not in all respects accepted.

The goods in suit are the faces of clocks made in five sizes, according to orders specifying dimensions, measurements, shapes and pattern, which orders come chiefly from the Ansonia Clock Company, but in part from the New Haven Clock Company; orders annually renewed, the transactions under which were "large and regular, so much every month."

The manufacturers abroad were the plaintiff's brothers, and plaintiff's imported the goods under the contract with the clock companies.

The goods at the time of importation were beveled, finished and ready to put in clock frames, of the size for which they were made, *in the condition as imported;*

they were invoiced *in the sizes in which they came*, as parts of watches.

The testimony of plaintiff and the manager of the Ansonia Clock Company was that these articles *were exclusively used for clocks—all of them* (Record, pp. 9 to 12 inclusive).

The defendant's witnesses were glass cutters and fancy-box dealers. The glass cutters practically admit that all the samples of importations but one are chiefly and principally used as parts of clocks, and as that sample (No. 2) was not representative of the size of any importation, and as the size ($6\frac{5}{8}$ x $4\frac{1}{4}$) claimed to have been used, by a fancy-box man was not represented by any sample, those exceptions are not important.

The record says on this point, folio 22: "In invoice, "Exhibit 3, the $2\frac{1}{2}$ x $2\frac{1}{2}$ round, and 4 x 3 square, are rep- "resented by Exhibits Sample 5 and 2, only a little "smaller. The glass 4 x 3 resembles Sample 2, only a "little different in size. * * * The largest square "piece is about $6\frac{5}{8}$ x $4\frac{1}{4}$. There is no sample of it "here." * * *

The testimony of the fancy-box people was that the glass which they used in the manufacture of boxes was in great part silvered. One witness said his goods were wholly so (fol. 38).

It is common knowledge that fancy boxes are not ornamented with window glass, and the Court may equally well assume that a clock face of silvered glass is not properly a clock face, but a mirror.

It further plainly appears in the testimony that clock glasses are always made to special order on measurements and pattern, and which seems generally true in regard to most of the other purposes for which glass is used.

The nicety of measurement required in clock faces is asserted by a witness for defendant who says, "If they are a sixteenth of an inch short, they won't do" (fol. 28).

Attention is called to special sizes in question which

confirm this and show that such sizes could not be used for general purposes nor profitably kept in stock —$6\frac{5}{8}$ x $4\frac{1}{2}$, 4 x $2\frac{29}{32}$ — $3\frac{1}{4}$ x $3\frac{1}{4}$, $6\frac{5}{8}$ x $4\frac{1}{8}$ — $6\frac{5}{8}$ x $4\frac{1}{4}$ (Record, page 10).

No question arises here on the sufficiency of the testimony or of the protest. Both parties went to the jury without objection (Record, pp. 13–19).

ARGUMENT.

There are but three assignments for error, all arising from the charge to the jury.

1. The charge that if "these articles were chiefly used as parts of clocks, that would determine their tariff classification" * * * "but * * * thatthey must be chiefly and principally used for that purpose."

2. The refusal of the Ceurt to charge that in order to find a verdict for plaintiffs the jury must be convinced by a fair preponderance of proof that the articles imported by plaintiffs were *used in trade exclusively* as parts of clocks and parts of watches.

3. The refusal of the Court to charge the jury to find for the collector, unless convinced by a fair preponderance of proof that the articles were used in *trade and commerce* solely in the manufacture of watches and clocks.

I.

It may be well by way of preface to say that the mere mention of a watch, clock or chronometer necessarily carries with it the mental conception of a glass face as a part of it. Who carries a watch without its glass crystal? How long would a chronometer or clock be kept free from dirt without the glass face? Whenever we look at it, either to see the time or the dial, we look through its transparent glass face.

To fit the frame it must be necessarily cut, and with the utmost accuracy and care.

So generally it must have been the intention of Congress when it enumerates parts of clocks, parts of chronometers and parts of watches in Schedule N of the Tariff of 1883 (22 Stat., 511 and 514), to include their glass faces in such designation, and that this designation is more specific than the clauses for "articles of glass cut" or "manufactures of glass n. o. p." was given to the jury as the law in the Court below, and not objected to here.

II.

It is not contradicted that the particular articles in suit were made, imported, sold and used for clock faces and therefore were actually "parts of clocks" within the common meaning of those words, as there was no proof of any trade meaning of them, if such were admissible.

Maddock vs. Magone, 152 U. S., 368.

Even if known in trade as beveled squares or circles of glass, which the jury did not find, nothing is dutiable

under that designation and the question would still remain—are they parts of clocks?

Fitted, prepared and intended for that use, it must be conceded that they are.

III.

The requests to charge were properly refused. How our articles "*are used in trade*" or "*in trade and commerce*," if that expression means anything more than or different from the ordinary business of common life is immaterial, for no amount of trade usage or trade testimony would justify the Court in calling that a part of a clock which was neither suitable for nor ordinarily used as a part of a clock.

Maillard vs. Lawrence, 16 Howard, 251.

These requests could only have confused the jury When we speak of "*trade usage*," we mean in the buying and selling of merchandise. There is no application of an article to any ultimate use in that. When we come to actual *use*, it has passed out of trade.

The use of the articles as "parts of clocks" is not required to be sole or exclusive, if they really are when imported "parts of clocks" made for, suitable for and intended to be used as such, bearing the "*earmarks*" as is said in Worthington vs. Robbins.

The "*intent*" of the importer may be left out of the calculation. He had no *intent* about the goods except to deliver them. He testified here about the character of the goods, because having made the contract with the manufacturer and the clock companies he knew what they were.

This proposition of "exclusive use" has not been

sustained even where the language of the statute was "substances expressly used for manure."

Magone vs. Heller, 150 U. S., 70, 75.

Whenever Congress has desired, and it often has in the very act under review, to make articles dutiable according to their *exclusive use* or a *particular* use, it has done so in express terms. It has not left such an intention open to inference or argument, as we shall show from the statute at the hearing.

IV.

The Court rightly charged that if these articles (referring probably to other articles of like sizes and shapes as well) were chiefly and principally used as parts of clocks that would determine their tariff classification.

Hartranft vs. Langfeld, 125 U. S., 128.
Robertson vs. Edelhoff, 132 U. S., 624 *et seq.*
Cadwallader vs. Wanamaker, 149 U. S., 532.
Walker vs. Seeburger, *Ibid.*, 541.
Hartranft vs. Meyer, *Ibid.*, 544.

The rule is the same as to chief or predominating material.

Arthur vs. Butterfield, 125 U. S., 70.
Hartranft vs. Meyer, 135 U. S., 237.
Liebenrath vs. Robertson, 144 U. S., 35.

V.

There is no conflict between Hartranft vs. Langfeld and the many cases in which that authority has been reaffirmed, and the doctrine of Worthington vs. Robbins that goods are to be classified for duty according to their condition when imported.

We rest our contention on both classes of cases. Evidence brought us directly within the Hartranft case, and the jury so found.

In their condition, when imported, our "articles" were *clock faces*, made in suitable sizes and shapes for that purpose, under a standing contract for clock faces, with clock companies ready for that use. They were invoiced in the sizes and shapes of clock faces, and called parts of watches, which if an error was a harmless one, and which put the Collector on inquiry as to what they were.

VI.

We shall not discuss Hartranft vs. Langfeld; it is settled law. Had it been unsupported by subsequent cases, we might inquire into the reasons on which it is founded, but it has so often controverted by the Treasury Department, and so often reaffirmed here, that it would be presumptuous in us to do more than accept it as it is, and leave its defense to the tribunal that made it.

We feel obliged also to say that where so many hat-material cases are on their way to this Court, represented by the experienced counsel who have hitherto conducted that litigation, that we think it almost unprofessional in a case of this small importance to open that great subject.

VII.

There is no reported case bearing upon the subject of parts of clocks, but there is an unreported case in the U. S. Circuit Court, Southern District of New York, the New Haven Clock Company vs. Robertson, tried in 1886, acquiesced in by the Treasury Department on the recommendation of the District Attorney, Solicitor of the Treasury and Attorney-General, and made a rule of action for the future—*but not for us, however.*

The Treasury decision in which it occurs is given in the appendix.

This case holding that a glass shade put over the clock to keep off the dust, and the wooden stand on which it rests are parts of the clock, goes very far beyond any contention we make.

VIII.

We submit that the true doctrine gathered from all the cases, but as yet expressly formulated in none, is this, that articles to be dutiable as hat materials, watch materials, parts of watches or clocks and the like should be articles which are fit and suitable for those purposes, which fitness and suitability must be apparent from their condition at the time of importation, and from which fitness and adaptability for use their probable chief use can be inferred.

Judgment should be affirmed.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Counsel for Defendant in Error.

APPENDIX.

(7322)

CLOCKS, GLASS SHADES AND WOODEN STANDS, AS PART OF.

TREASURY DEPARTMENT, Jan. 19, 1866.

SIR—The Department is in receipt, through the Solicitor of the Treasury, of a letter dated the 21st ult., from the U. S. Attorney for the Southern District of New York, reporting the trial of the case of the New Haven Clock Company against Wm. H. Robertson, former Collector of Customs (U. S., 9735), which resulted in a verdict for the plaintiff.

The question involved in this suit was whether certain glass shades used to cover clocks and the wooden stands on which the clocks and shades stood, were dutiable at the rates of 40 per cent. and 35 per cent. *ad valorem*, respectively, as assessed by the defendant at the time of importation, or at the rate of 30 per cent. *ad valorem* as claimed by the plaintiff, the latter being the rate prescribed by Schedule N (T. I., new, 414) for " parts of clocks."

The United States Attorney reports that evidence was produced tending to show that the stands and shades in question were imported at the same time and in the same invoice with the clocks which they were intended to cover, and that the clocks so imported were of such a character as to render the stands and shades necessary to protect their works from dirt and dust, and to prevent the early tarnishing thereof; and, also, that evidence was produced to indicate that the shades and stands were bought from the same parties as the clocks, and that they were sold together—that is to say, a person buying one of the clocks would also buy the stand and shade which belonged to it, and all would be spoken of and sold and paid for as a clock.

The United States Attorney expresses the opinion that the verdict in the case was a proper one, and recommends that it be acquiesced in by the department, with the understanding, however, that cases of similar character should be judged by the particular and peculiar facts in each case; that is to say, if the shades and stands are imported at the same time with the cloaks, in equal numbers, and fitted and adapted and intended for each other, the stands and shades should be fairly considered as parts of clocks, and as liable to the rate of duty prescribed by law therefor.

In this recommendation the Solicitor of the Treasury concurs, and upon submission of the case to the United States Attorney-General, under the Act of March 3, 1875, that officer advises that no writ of error or appaal will be taken by the United States.

In view of this recommendation, the Department concurs in such decision, and you are, therefore, authorixed, upon due entry of judgment in the case, to take the necessary steps for its payment and settlement.

You are also directed to apply the said decision to all similar suits now pending at your port, where the appraiser shall report that the stands and shades are parts of clocks, imported therewith, as aforesaid, and where the provisions of law as to protest, appeal and institution of suit, etc., have been fully complied with, and to forward certified statements for the consideration of the Department.

The Department's decision of November 13, 1883 (Synopsis, 6014), of a contrary tenor, will be considered as amended in the particular mentioned.

Respectfully yours,

C. S. FAIRCHILD,
Assistant Secretary.

COLLECTOR OF CUSTOMS, New York.